LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 29 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 927

IN THE MATTER
of
LANDON ZUCKERMAN and SAM HABER,
Petitioners,
against
SAMUEL GREASON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD M. SPITZER,
Chief Counsel,
Judicial Inquiry on
Professional Conduct,
Attorney for Respondent,
821 Franklin Avenue,
Garden City, N. Y. 11530.

TABLE OF CONTENTS

	Page
Statutes and Rules Involved	1
Statement	5
Argument	8
Point I — The Appellate Division Correctly Followed The Mandate Of The Supreme Court and Reconsidered "In Light Of *Spevack* v. *Klein* ***" — *Garrity* v. *New Jersey* Was Inapplicable	8
Point II — Petitioners Were Not Denied Due Process	11
Point III — Petitioners Were Charged With And Found Guilty Of Violation Of Canons Of Ethics, Canon 9, Not Special Rule 7. There Is No Ex Post Facto Question Involved	14
Point IV — The Referee And The Court Considered The Evidence As To Each Petitioner	15
Conclusion	15
Appendix "A"	A-1

Cases

Page

Anonymous v. *Baker*, 360 U.S. 287 ..... 11, 12

Cohen v. *Hurley*, 366 U.S. 117 10

Erie County Water Authority v. *Western New York Water Company*, 304 N.Y. 342 12

Ex Parte Wall, 107 U.S. 265 ..... 9, 12

Garrity v. *New Jersey*, 385 U.S. 500 ..... 8, 9

In Re Dwyer, 254 A.D. 769 9

In Re Haber, — U.S. —, 87 S. Ct. 1016 10

In Re Kreisel, 250 N.Y.S. 2d 250 9

Kaye v. *Co-ordinating Committee on Discipline*, — U.S. —, 87 S. Ct. 848 10

Matter of Phillies, 17 A.D. 2d 93 9

Matter of Stanley Louis Pines, 26 A.D. 2d 424 9

Matter of Harold F. Powell, 23 A.D. 2d 148 9

Matter of John Ruffalo, Jr., No. 73, October Term, 1967, certiorari granted October 9, 1967 14

Spevack v. *Klein*, 385 U.S. 511 ..... 6, 8, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 927

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER,
Petitioners,

against

SAMUEL GREASON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statutes and Rules Involved

Judiciary Law, State of New York, Section 90, subdivisions 2, 6 and 7:

> "2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is

guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice. ***"

"6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at anytime within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges. ***".

"7. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the

supreme court, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said presiding justice may, in a county wholly included within a city or in a county having a population of over three hundred thousand inhabitants, appoint an attorney and counsellor-at-law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon."

Canons of Professional Ethics, Canon 9 (Appendix to New York Judiciary Law):

"9. Negotiations with Opposite Party

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Special Rules of the Appellate Division, Second Department in Regard to Conduct of Attorneys, in effect January 1, 1940:

"Rule 5

Preservation of records of actions, claims and proceedings.

In every action, claim and proceeding of the nature described in rule three, attorneys for all the

parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontuance of any action or proceeding brought."

("Rule three" mentioned refers to actions or claims arising from personal injuries or property damage, etc. under contingent fee retainer.)

Special Rules of the Appellate Division, Second Judicial Department, adopted July 1, 1960, relating to conduct of attorneys:

"Rule 7

Prohibition of communication with adverse party.

No attorney shall communicate directly or indirectly upon the subject of any pending claim or action with an adverse party plaintiff or defendant known to him to be represented by attorney without the latter's knowledge and consent, nor shall he permit any claim agent or other representative of his client to interview an adverse party plaintiff or defendant or obtain any statement from him, or make any settlement with him without the knowledge and consent of the latter's attorney."

Statement

In March or April of 1960 the Petitioners were informed by the Judicial Inquiry that it was interested in checking into certain aspects of their negligence practice. This was before any disclosures were made by the Petitioners. At that time the Petitioners stated to the Inquiry that they wished to cooperate in furnishing the desired information. Thereafter, from time to time, informal interviews were had and certain files and records were produced, either in response to letters or subpoenae, all without objection. (See transcript of testimony, pp. 570-572.) This continued until about May, 1961 when the Petitioner Zuckerman refused to continue an inspection of certain financial records and asserted his constitutional privilege (transcript of testimony, pp. 74, 75).

Eventually charges in disciplinary proceedings were filed against Petitioners, hearings held before a Referee, and finally, the Appellate Division, on March 3, 1965, disbarred the Petitioner Landon Zuckerman and suspended the Petitioner Sam Haber from the practice of law for a period of five years (23 A.D. 2d 825). The charges on which findings of guilt were made by the Appellate Division against both Petitioners were as follows:

> "5B. The respondent *** has submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon."
>
> "5F. The respondent *** has built up medical bills for submission to insurance companies by referring claimants to a succession of doctors, orthopedists, neurosurgeons, etc."
>
> "5H. The respondent *** has improperly and in violation of the Canons of Ethics used investigators

to sign up retainers, to obtain adversary statements from parties represented by attorneys, and by having blank guardian ad litem forms signed by claimants."

In addition, Petitioner Landon Zuckerman was found guilty of charge 5A:

> "The respondent has deliberately refused to cooperate with the Court in its efforts to expose unethical practices and in its efforts to determine whether he has committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar."

A motion for leave to appeal to the Court of Appeals was denied July 9, 1965 (16 N.Y. 2d 482). On February 13, 1967 the United States Supreme Court granted certiorari, vacated the order of the Appellate Division and remanded the case to that Court "for reconsideration in light of *Spevack* v. *Klein,* 385 U.S. 511" (386 U.S. 15). The mandate of the Supreme Court stated that this was done in order that such proceedings might be had "as accord with right and justice, and the Constitution and laws of the United States". On March 20, 1967 the Appellate Division, without notice to Zuckerman or Haber, or opportunity to them to be heard, dismissed charge 5A against Zuckerman and sustained charges 5B, 5F and 5H against both. That was the same disposition which had been made by the Appellate Division before review by the Supreme Court, except that charge 5A was dismissed against Zuckerman and he, also, was suspended for five years instead of being disbarred (27 A.D. 2d 848). The Order was reversed for lack of due process in not affording an opportunity to be heard (19 N.Y. 2d 977-978).

After a hearing—no further evidence was offered—the Appellate Division entered an order on July 10, 1967 to the same effect as its order of March 20, 1967 (28 A.D. 2d 907).

Zuckerman and Haber again appealed to the Court of Appeals and by Opinion dated October 31, 1967, the Order appealed from was affirmed. It is on that decision that the present appeal is being taken to this Court.

ARGUMENT

POINT I

The Appellate Division correctly followed the mandate of the Supreme Court and reconsidered "in light of Spevack v. Klein *"—Garrity v. New Jersey was inapplicable.**

Petitioners' Questions, numbered 1, 2 and 3, and Reasons for Granting the Writ under number 1 revolve around the argument that the Appellate Division did not fulfill the mandate of this Court inasmuch as it did not apply the doctrine of *Garrity* v. *New Jersey,* 385 U.S. 500, 17 L.Ed. 2d 562. We submit that this Court directed the Appellate Division to reconsider this case in the light of *Spevack* v. *Klein,* 385 U.S. 511 (386 U.S. 15, 17 L.Ed. 2d 696, 87 S. Ct. 847). The mandate of this Court did not refer to *Garrity* v. *New Jersey,* although both *Spevack* and *Garrity* were decided on the same day, January 16, 1967. The Appellate Division proceeded to reconsider the matter "in light of Spevack v. Klein" and after reconsideration dismissed charge 5A (failure to cooperate by invoking the Fifth Amendment) against Petitioner Zuckerman and affirmed its findings of guilt against both Petitioners on the remaining charges. Although neither of the Petitioners made any objections on constitutional grounds to the production of any of the files or to the giving of testimony on which these remaining charges are based, at least in part, they now assert that such evidence was "coerced" and should be eliminated under the doctrine of *Garrity.* This despite the fact that the record indicates that both Petitioners not only made no objection to such evidence but affirmatively proclaimed their desire to cooperate.

In *Spevack* this Court decided that a lawyer could not be disbarred (or disciplined) for asserting his constitutional privilege against self-incrimination. In *Garrity*

v. *New Jersey*, 385 U.S. 500, 17 L.Ed 2d 562, the Court stated:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced confessions prohibits the use in *subsequent criminal proceedings* of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." (Italics added.)

Garrity excluded the "coerced" testimony in subsequent criminal proceedings. It does not hold, for example, that this testimony could not be used in proceedings brought to remove the corrupt policeman or in other non-criminal proceedings. It is well established that disciplinary proceedings, on the other hand, are not criminal proceedings, but are civil in nature (*Ex Parte Wall*, 107 U.S. 265, at p. 288; *Matter of Phillies*, 17 A.D. 2d 93, and cases cited therein, motion for leave to appeal denied, 12 N.Y. 2d 645). Moreover, in *Garrity* the coercion question arose because of the New Jersey statute which clearly required discharge for failure to waive immunity. There is, of course, no similar statute in disciplinary proceedings and the matter of sanctions if any to be imposed for non-cooperation vary greatly, depending on the facts of each case. See *In Re Kreisel*, 21 A.D. 2d 431, 250 N.Y. Supp. 2d p. 250, where the attorney was convicted of five charges including a charge of failing to cooperate. A one year suspension was imposed. See also *Matter of Stanley Louis Pines*, 26 A.D. 2d 424, six months suspension; *Matter of Harold F. Powell*, 23 A.D. 2d 148, 259 N.Y.S. 2d 171, one year suspension; *In Re Dwyer*, 254 A.D. 769, 4 N.Y.S. 2d 895, three year suspension.

Furthermore, there may be many reasons why lawyers, as members of an honorable profession, may choose to testify and cooperate when their professional conduct is

called into question. One of these reasons may well be the established understanding that cooperation with the Court's inquiry is a factor to be considered in mitigation.

It should also be noted that Rule 5 of the Special Rules of the Appellate Division, Second Department (*supra*) required that lawyers in contingent fee negligence cases preserve records for a period of five years. The case files and records requested of the Petitioners clearly fall within the above Rule.

As a practical matter we submit that there is no basis to infer that a lawyer, despite positive statements of the desire to disclose evidence and to cooperate was, nevertheless, acting under "implied coercion". This is demonstrated by the fact that Petitioner Zuckerman, despite the existence of *Cohen* v. *Hurley,* when it suited his purposes, refused to turn over his financial records and invoked his constitutional privilege. Futhermore, it should be noted that the disclosures that were made by Petitioner Zuckerman before he invoked his privilege, as well as the disclosures made by Petitioner Haber, did not "incriminate" nor were they thereby subjected to any criminal prosecution. The Petitioners cite *Kaye* v. *Co-ordinating Committee on Discipline,* — U.S. —, 87 S. Ct. 848, as authority for their position, pointing out that he had testified. There were, however, other issues in that case. Kaye had testified in the preliminary investigation but thereafter invoked his constitutional privilege and refused to testify before the Referee and objected to the introduction of his preliminary testimony before the Referee on constitutional grounds. Also, the Appellate Division drew an impermissible presumption and inference from his failure to testify after invoking his privilege. Petitioners also argue that the inclusion of Haber in this Court's vacatur and its denial of petition for rehearing as to Haber (— U.S. — 87 S. Ct. 1016) is indicative that this Court had *Garrity* in mind. We submit that no such inference can reasonably be drawn.

POINT II

Petitioners were not denied due process.

Petitioners claim under Questions 4 and 5, and Reasons for Granting of Writ, No. 2 and No. 3, that they were denied due process of law in that the Appellate Division, Second Department, in the creation of the Judicial Inquiry, is the investigator, prosecutor and then sat in judgment in the prosecution of the Petitioners, and has no power to review the conduct of attorneys under Section 90 of the Judiciary Law of the State of New York.

As in the Brooklyn "ambulance chasing" Judicial Inquiry, referred to by this Court in *Anonymous* v. *Baker*, 360 U.S. 287, the Judicial Inquiry in Nassau County was instituted in 1959 by the Appellate Division, Second Department, on the Application of the Bar Association of Nassau County, and respondent herein was nominated by the Bar Association of Nassau County and appointed by the Appellate Division as Chief Counsel. This Order directed that a judicial inquiry and investigation be made, pursuant to New York State Constitution, Article VI, Section 2; Judiciary Law, Sections 90, 86, as to:

1. The alleged improper practices by attorneys and counselors at law in Nassau County;
2. The alleged corrupt and unethical practices by attorneys and counselors at law in Nassau County, in the solicitation of retainers, in the subsequent prosecution and disposition of claims and actions, and in any other matters;
3. Any and all other practices by attorneys and counselors at law in Nassau County, involving professional misconduct, fraud deceit, corruption and crime; and

4. Any and all conduct by attorneys and counselors at law in Nassau County, prejudicial to the administration of justice.

The Petitioners, pursuant to the Special Rule Regulating the Conduct of Attorneys and Counsellors at Law, had filed contingent retainers in personal injury cases as follows:

1956	212
1957	270
1958	225
1959	178

This led to the investigation of Petitioners.

This Court, in *Anonymous* v. *Baker,* 306 U.S. 287, reviewed the nature of the proceedings as to discipline and removal of members of the Bar, placed by law in the Appellate Division of the Supreme Court (Sec. 90, Judiciary Law) and refused to find unconstitutional the procedures followed in such an inquiry.

There is no failure to meet constitutional standards of due process.

As to the power to review the conduct of attorneys under Section 90 of the Judiciary Law of the State of New York, this Court has reviewed many proceedings involving Section 90 since its promulgation, prior to 1912.

In *Erie County Water Authority* v. *Western New York Water Company,* 304 N.Y. 342, cert. denied 344 U.S. 892, this Court held "members of the legal profession of New York are officers of the New York Supreme Court and the Appellate Division of that Court has exclusive jurisdiction to say what constitutes professional misconduct".

In *ExParte Wall,* 107 U.S. 265, this Court, discussing the nature of a disciplinary proceeding, stated (at pp. 288, 290):

"The power to do this (impose discipline for professional misconduct) is a rightful one; and when exercised in proper cases, is no violation of any constitutional provision.

***

"We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the rolls, are always conducted.

***

". . . the action of the court in cases within its jurisdiction is due process of law."

Petitioners claim under Question 6 that the Petitioners were denied due process by the failure of the Appellate Division upon remand to grant a hearing de novo. This position is untenable.

The Order of the Supreme Court directed a remand to the Appellate Division of the Supreme Court of New York, Second Judicial Department, "for reconsideration in light of *Spevack* v. *Klein*".

Upon remand the Appellate Division reversed the conviction on charge 5A (failure to cooperate by invoking the Fifth Amendment) on notice as directed by the Court of Appeals.

We submit that the only issue before the Appellate Division to be decided was that under *Spevack* v. *Klein*, and that such remand could in no way be construed a *general* remand or a reversal for a new trial wherein the entire record is reviewed "de novo" together with any new issues Petitioners wish to raise.

POINT III

Petitioners were charged with and found guilty of violation of Canons of Ethics, Canon 9, not Special Rule 7. There is no ex post facto question involved.

Petitioners claim under Question 7 and Reasons for Granting the Writ, No. 4, that Rule 7, enacted by the Appellate Division on July 1, 1960, is ex post facto as it applies to acts or omissions committed by Petitioners prior to that date.

Charge 5H charges Petitioners with violation of the *Canons of Ethics*. The Canons of Ethics were adopted in New York in 1909; Rule 7 is merely a repetition and amplification of Canon 9 and was promulgated by the Appellate Division because of the disregard shown by attorneys for the prohibitions contained in Canon 9.

The Appellate Division in deciding this case had the Referee's report before it, and notwithstanding the mention of Rule 7 by the Referee, found as to charge 5H—

> "***both respondents, improperly and in *violation of the Canons of Ethics,* used investigators to obtain signed retainers, to obtain adversary statements from parties represented by attorneys***". (Italics added.)

It is apparent that no attention was paid to the Referee's misnomer as to charge 5H and that the finding by the Appellate Division was a violation of Canon 9, Canons of Professional Ethics.

In Reasons for Granting the Writ, No. 5, Petitioners cite *Matter of John Ruffalo, Jr.,* No. 73, October Term, 1967, certiorari granted October 9, 1967. The facts there are not similar to those proven under charge 5H herein and the issues are not the same.

POINT IV

The Referee and the Court considered the evidence as to each Petitioner.

In answer to Question presented, No. 8, the Referee and the Appellate Division had the record and the proof before them. The Referee found both Petitioners guilty of charges 5B, 5F and 5H, and absolved Haber of charge 5A. The Appellate Division, after long and careful consideration of the record and the Referee's Report, saw fit to follow the Referee's recommendations based on the proof.

The Appellate Division could confirm or disaffirm any finding of the Referees, and its ultimate decision is based on the proof alone.

CONCLUSION

The Petition for the granting of a Writ of Certiorari should be denied.

Respectfully submitted,

HAROLD M. SPITZER,
Chief Counsel,
Judicial Inquiry on
Professional Conduct,
Attorney for Respondent.